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IN THE CIRCUIT COURT OF MINGO COUNTY, WEST VIRGINIA

SERGEANT GLEN MESSER OF THE
SHERIFF'S DEPARTMENT OF
MINGO COUNTY, WEST VIRGINIA,
Plaintiff below, Appellee herein,

Plaintiff below, Appellee herein,
v.

Appeal No.: 06-AAA-1
Chief Judge Michael Thornsberry

SHERIFF LONNIE HANNAH, SHERIFF
OF MINGO COUNTY, WEST VIRGINIA,

Defendant below, Appellant herein

**FINAL ORDER DENYING APPEAL AND AFFIRMING THE FINAL ORDER OF THE
MINGO COUNTY CIVIL SERVICE COMMISSION**

FILED
CIRCUIT COURT
MINGO COUNTY, W
2007 JAN 30 PM 19

On January 17, 2007 this matter came before the Court pursuant to hearing on Appellant, Sheriff Lonnie Hannah's ("Sheriff Hannah") Appeal of the Mingo County Civil Service Commission for Deputy Sheriffs' Final Order Relevant to Indefinite Suspension of Sergeant Glen Messer. Appellant, Sheriff Hannah, appeared in person and by counsel, Jeffrey Wakefield. Glen Messer appeared in person and by counsel Christopher Younger. The Court has considered the instant appeal, all responses, arguments of counsel, the complete record in this case, and all relevant legal authority and hereby **DENIES** the appeal based upon the following findings of fact and conclusions of law, to-wit:

FINDINGS OF FACT

1. This Appeal stems from the Final Order Relevant to the Indefinite Suspension of Sergeant Glen Messer ("Final Order") by the Mingo County Civil Service Commission for Deputy Sheriffs ("the Commission") entered on September 19, 2006. Sheriff Hannah brings this appeal pursuant to West Virginia Code § 7-14-17(b).

2. Between April 10, 2006 and April 13, 2006 Deputy Sheriff Glen Messer attended specialized training at the West Virginia State Police Academy in Institute, West Virginia ("Academy"). Deputy Sheriff Charles Justice also attended the same training. Both Messer and Justice were entitled to charge for overtime for training or travel or travel time if such time went outside of their normal hours of duty. (Tr. 25).
3. Messer and Justice submitted separate payroll notices requesting overtime for travel to and from the Academy to Sheriff Hannah at the completion of the training. (Tr. 26).
4. Generally, two hours of overtime is allowed for travel to and from the Academy. Messer submitted the following payroll change notices:
 - a. One payroll change notice dated April 10, 2006, reflecting that Messer worked two hours of overtime, from 6:00a.m. to 8:00a.m., for traveling to the Academy;
 - b. One payroll change notice dated April 10, 2006, reflecting that Messer worked two hours of overtime, from 4:00p.m. to 6:00p.m., for traveling from the Academy;
 - c. One payroll change notice dated April 11, 2006, reflecting that Messer worked two hours of overtime, from 6:00a.m. to 8:00a.m., for traveling to the Academy;
 - d. One payroll change notice dated April 11, 2006, reflecting that Messer worked two hours of overtime, from 4:00p.m. to 6:00p.m., for traveling from the Academy;
 - e. One payroll change notice dated April 12, 2006, reflecting that Messer worked two hours of overtime, from 6:00a.m. to 8:00a.m., for traveling to the Academy;
 - f. One payroll change notice dated April 12, 2006, reflecting that Messer worked four hours of overtime, from 5:00p.m. to 9:00p.m., for training at the Academy;

- g. One payroll change notice dated April 12, 2006, reflecting that Messer worked two hours of overtime, from 9:00p.m. to 11:00p.m., for traveling from the Academy;
 - h. One payroll change notice dated April 13, 2006, reflecting that Messer worked two hours of overtime, from 6:00a.m. to 8:00a.m., for traveling to the Academy; and,
 - i. One payroll change notice dated April 13, 2006, reflecting that Messer worked two hours of overtime, from 4:00p.m. to 6:00p.m., for traveling from the Academy. (Tr. 26).
- 5. Messer claimed, in total, sixteen (16) hours of overtime for travel to and from the Academy for specialized training. The payroll change notices were recommended by Chief Deputy Stroud and authorized by Sheriff Hannah on April 24, 2006 and a payroll check was issued in Messer's name, which included the amount of overtime claimed. (Tr. 32-42).
- 6. Following the submission of the payroll change notices by Messer, Sheriff Hannah discovered that Messer had claimed more overtime hours than claimed by Justice. (Tr. 43-33)
- 7. Unlike Messer, Justice did not claim two hours of overtime for travel from the Academy on April 12, 2006 or two hours of overtime for traveling to the Academy on April 13, 2006. Upon discovering the discrepancy, Sheriff Hannah asked Justice why his hours claimed in the payroll changes were less than Messer's. Justice informed Sheriff Hannah that he did not count as much travel time since he had stayed at a Motel 6. (Tr. 43-44).

8. In later testimony before the Commission, Justice testified that he claimed six hours of overtime for April 12, 2006, which included two hours for travel and four hours in the evening for low light shooting at the Academy. (Tr. 124). Messer was present and taking the low light shooting as well. (Tr. 125). Justice testified that after the training Justice left his cruiser at the Academy and rode with Messer. (Tr. 125-126). Justice testified that he and Messer stopped at a convenience store and bought a 12-pack of beer and then went to Messer's room at the Motel 6 in Cross Lanes. (Tr. 125-126). Justice testified that sometime after 11:00p.m., that he went to bed and that Messer was in the room when Justice went to sleep and that Messer was in the room when Justice awoke in the morning. (Tr. 126).
9. Apparently without discussing the matter with Messer or instituting an internal administrative investigation, Sheriff Hannah contacted the West Virginia State Police and requested an investigation regarding Messer's alleged false claims regarding overtime. (See paragraph 6 of Final Order Relevant to Indefinite Suspension of Sergeant Roy Glen Messer). At no time did Sheriff Hannah attempt to handle the discrepancy in overtime with Messer administratively, but rather went immediately to the West Virginia State Police requesting a criminal investigation as to whether Messer had committed a crime: Attempt (false pretenses), a violation of West Virginia Code § 61-11-8(3) and § 61-3-24(a)(3). (See paragraph 8 of Final Order Relevant to Indefinite Suspension of Sergeant Roy Glen Messer and (Tr. 46-47).
10. On May, 11, 2006 Sgt. M. LaFauci of the West Virginia State Police was directed to investigate the matter. (Tr. 100-102).

11. Sgt. LaFauci contacted the Motel 6 in Cross Lanes and discovered that Messer had rented a room from April 10, 2006 through April 13, 2006. (Tr. 104). On May 12, 2006 Sgt. LaFauci met with Sheriff Hannah and advised the Sheriff about the information received from Motel 6. (Tr. 48-49, 105). After speaking with Sgt. LaFauci Sheriff Hannah suspended Messer indefinitely pending the outcome of the investigation. (Tr. 49-50).
12. By letter dated May 12, 2006 Sheriff Hannah informed Messer of an ongoing investigation involving Messer's submission of allegedly fraudulent documents. (Tr. 106-107). Sheriff Hannah then suspended Messer indefinitely without pay until the matter was resolved. (Tr. 106-107). The same day, Sgt. LaFauci met with the Mingo County Prosecuting Attorney Michael Sparks. (Tr. 106-111). Sparks advised Sgt. LaFauci that there was probable cause and requested that Sgt. LaFauci personally go to the Motel 6 and obtain a copy of the Motel 6 statement. (Tr. 106-111). Sgt. LaFauci then obtained a copy of the Motel 6 statement that reflected that Messer had rented a room at the Motel 6 in Cross Lanes, West Virginia from April 10, 2006 through April 12, 2006. (Tr. 106-109).
13. During the course of the investigation, Messer provided a statement to Sgt. LaFauci in which he acknowledged that he had rented the motel room at Motel 6 while training at the Academy. (Tr. 108). Messer further stated that he had stayed at the motel "some" and that he had driven home "a few times". (Tr. 108). Messer advised Sgt. LaFauci that he had claimed the overtime for travel instead of charging the Sheriff's Office for the motel stay and fuel because he thought the travel time would be less than the motel. (Tr. 108).
14. At the July 18, 2006 hearing before the Commission, Sgt. LaFauci testified that Prosecuting Attorney Sparks contacted Sgt. LaFauci and advised him to obtain a criminal

complaint based upon the results of the investigation. (Tr. 111). Sgt. LaFauci testified that on June 6, 2006 he was on his way to obtain a criminal complaint when Prosecuting Attorney Sparks told him not to have the Magistrate sign the summons and advised Sgt. LaFauci to prepare a report to present to the September term the Grand Jury in the event that the matter could not be resolved administratively. (Tr. 112). Sgt. LaFauci testified that he believed there was legally sufficient evidence to bring a charge of attempting to obtain money under false pretenses and that he believed there was concrete evidence that on at least one night Messer stayed at the Motel 6. (Tr. 106-112).

15. On July 7, 2006 Prosecuting Attorney Sparks sent a letter to Sheriff Hannah advising Sheriff Hannah that there was legally sufficient evidence that Messer did commit the offense of Attempt (False Pretenses), a violation of West Virginia Code § 61-11-8-(3) and § 61-3-24(a)(3), in connection with Messer's employment as public official. Sparks further advised Sheriff Hannah that Messer's integrity and credibility as a law enforcement officer had been irreparably compromised and that he would not prosecute any case in which Messer was the primary investigating officer. (See Plaintiff's Exhibit 12)
16. At the July 18, 2006 hearing before the Commission, Sparks testified that he requested appointment of a special prosecutor to handle the matter involving Messer and that he believed there was sufficient evidence to charge Messer or he would not have gone through the process of requesting a special prosecutor. (Tr. 142-143). Sparks testified that if he had questions concerning Messer's credibility, he could not in good faith put Messer on the witness stand to testify against a criminal defendant because the credibility of a law enforcement officer is very important in obtaining convictions. (Tr. 144-145).

Sparks also testified that he might have to disclose this instance of Messer's credibility under legal rules requiring the prosecuting attorney to disclose to exculpatory evidence to a criminal defendant. (Tr. 145).

17. Messer declined to testify at the July 19, 2006 hearing before the Commission when Sheriff Hannah called him as a witness, invoking his rights based upon the allegations of the Sheriff and Prosecuting Attorney. (Tr. 22-24).
18. It is undisputed that Messer requested payment for overtime related travel. It is undisputed that he did not ask for reimbursement for the motel bill.
19. Messer asserts that the Sheriff pre-authorized two hours for travel time each way even though the Sheriff knew the actual travel time was 1.5 hours each way. (See Paragraph 4 under Argument Section Messer's Response to Sheriff Hannah's Appeal).
20. The September 19, 2006 Final Order Relevant to Indefinite Suspension of Sergeant Roy Glen Messer of the Mingo County Civil Service Commission of Deputy Sheriffs, in its entirety, states as follows:

"On July 18, 2006, hearing was conducted by the Mingo County Civil Service Commission for Deputy Sheriffs ("Commission") in the Mingo County Commission's Meeting Room pursuant to notice. All parties were represented by legal counsel, who following the preparation and submission of transcript of hearing, timely submitted to the Commission proposed Findings of Fact and Conclusions of Law and Responses thereto filed by Petitioner and Respondent on or about September 10, 2006.

Each member of the Commission was present at the hearing held on July 18, 2006, each member received a copy of the transcript of hearing and each received the parties' Findings of Fact and Conclusions of Law and Responses thereto and reviewed and considered same. Each member has now come together and decided this case as follows:

Between April 10, 2006 and April 13, 2006 Deputy Sheriff Glen Messer ("Messer") attended specialized training at the West Virginia State Police Academy in Institute, West Virginia ("Academy"). Deputy Sheriff Charles Justice ("Justice") also

attended the same training. Both Messer and Justice were entitled to charge for overtime for training or travel or travel time if such time went outside of their normal hours of duty.

Subsequent to the specialized training, Sheriff Lonnie Hannah received payroll change notices from Messer and Justice. In all, Messer claimed sixteen hours of overtime for travel to and from the specialized training.

Following submission of the payroll change notices by Messer, Sheriff Hannah discovered that Messer had claimed more overtime hours than claimed by Justice.

Unlike Messer's payroll change notices, Justice did not claim two hours of overtime for travel from the West Virginia State Police Academy on April 12, 2006, or two hours of overtime for traveling to the West Virginia Police Academy on April 13, 2006.

After discovering the discrepancy between the overtime hours claimed, Sheriff Hannah questioned Justice about the discrepancy, and Justice indicated that he had stayed at a motel in Cross Lanes, West Virginia, with Messer during one night, and that is why he did not claim overtime for travel on that date.

Apparently without discussing the matter with Messer or instituting an internal administrative investigation, Sheriff Hannah contacted the West Virginia State Police and requested an investigation be made regarding Messer's additional overtime claim.

An investigation was made by the West Virginia State Police, wherein Messer stated to the investigating officer, Sgt. M. LaFauci, that he, Messer, stayed at a motel some and drove home a few times. Messer further advised Sgt. LaFauci that he had claimed overtime for travel instead of charging the Sheriff's Office for the motel stay and fuel, because he thought the travel time would be less than the cost of the motel.

At no time did Sheriff Hannah attempt to handle the discrepancy in overtime charged with administratively, but rather went immediately to the West Virginia State Police for a criminal investigation as to whether Messer had committed a crime: Attempt (false pretenses), a violation of West Virginia Code, § 61-11-8(3) and § 61-3-24(a)(3).

Messer did not testify at the hearing and asserted his Fifth Amendment rights because of the pending criminal investigation.

From the evidence adduced at hearing, it appears that Messer may overstated his overtime by three (actual driving time) to four (allowed time) hours because of his overnight stay in a motel following his late night training on April 12, 2006.

Based upon the foregoing facts, it is the ruling of the ruling of the Commission that Sheriff Hannah did not have 'just cause'

for the imposition of the indefinite suspension of Messer without pay, under West Virginia Code, § 7-14-17, and that Messer should not have been suspended without pay, as the alleged misconduct of overstated overtime was not of a substantial nature which directly affected the rights and interest of the public. Rather, it is the conclusion of this Commission that Messer's conduct, in claiming the additional three to four hours of overtime was trivial and inconsequential and a mere technical violation of statute of official duty without wrongful intention, as Messer indicated to the investigating State Police Officer that he felt that charging for overtime driving to and from his training would cost the Sheriff's Office less than the cost of his motel room. Again, this Commission feels that the Sheriff should have attempted to handle this discrepancy in overtime charges in an administrative manner rather than through a State Police investigation of Messer.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is the order of this Commission that the grievance filed by Sergeant Roy Glen Messer relative to his indefinite suspension is hereby sustained and that the Sheriff failed to justify his action before this Commission.

Deputy Messer shall be reinstated to his former rank and position with full pay, forthwith and without any additional Order, for the entire period during which he was prevented from performing his usual employment, and no charges may be officially recorded against his record.

Deputy Messer's legal counsel shall be awarded reasonable attorney fees to be determined by this Commission and paid by the Sheriff from County funds.

A written record of all testimony taken at the hearing shall be kept and preserved by this Commission, which record shall be sealed and not be open to public inspection unless an appeal is taken from the action of this Commission.

Mingo County Sheriff has an immediate right of appeal to the Circuit Court of Mingo County, West Virginia. Any appeal must be taken within ninety (90) days from the date of this Order by the Commission."

21. Thereafter, Deputy Messer was reinstated to duty and apparently paid his back pay.

CONCLUSIONS OF LAW

1. West Virginia Code § 7-14-17(b) states that "In the event the civil service commission sustains the action of the sheriff, the deputy has an immediate right of appeal to the circuit court of the county. In the event that the commission reinstates the deputy, the sheriff has an immediate right of appeal to the circuit court. In the event either the sheriff or the deputy objects to the amount of the attorney fees awarded to the deputy, the objecting party has an immediate right of appeal to the circuit court. [T]he circuit court shall proceed to hear the appeal upon the original record made before the commission and no additional proof may be permitted to be introduced. The circuit court's decision is final, but the deputy or sheriff, as the case may be, against whom the decision of the circuit court is rendered has the right to petition the supreme court of appeals for a review of the circuit court's decision as in other civil cases. The deputy or sheriff also has the right, where appropriate, to seek, in lieu of an appeal, a writ of mandamus."
2. "A final order of a deputy sheriffs' civil service commission, based upon findings not supported by the evidence, upon findings contrary to the evidence, or upon a mistake of law, will be reversed and set aside by this Court upon review." Syl. pt. 1, Mangum v. Lambert, 183 W.Va. 184, 394 S.E.2d 879 (1990).
3. "An adjudicative decision of the Correctional Officers' Civil Service Commission should not be overturned by an appellate court unless it was clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Review under this standard is narrow and the reviewing court looks to the Civil Service Commission's action to determine whether the record reveals that a substantial and rational basis exists for its decision." Syl. pt. 1, In re Queen, 196 W.Va. 442, 446, 473 S.E.2d 483, 487 (1996).

4. "An appellate court may reverse a decision of the Correctional Officers' Civil Service Commission as clearly wrong or arbitrary or capricious only if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that was so implausible that it could not be ascribed to a difference in view or the product of Commission expertise." Syl. pt. 2, In re Queen, 196 W.Va. 442, 446, 473 S.E.2d 483, 487 (1996).
5. "The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." Syl. pt. 3, In re Queen, 196 W.Va. 442, 446, 473 S.E.2d 483, 487 (1996).
6. "Substantial evidence" requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive." Syl. pt. 4, In re Queen, 196 W.Va. 442, 446, 473 S.E.2d 483, 487 (1996).
7. "If an administrative agency's factual finding is supported by substantial evidence, it is conclusive. Neither this Court nor the circuit court may supplant a factual finding of the Commission merely by identifying an alternative conclusion that could be supported by substantial evidence. (citations omitted) Also, this Court may not "displace the ... [Commission's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before ... [us] *de novo*.'" (citations omitted) In re Queen, 196 W.Va. 442, 446, 473 S.E.2d 483, 487 (1996).

8. Sheriff Hannah timely filed the instant appeal on November 2, 2006. Sheriff Hannah raises two assignments of error. The first is that the Commission erred in ruling that Sheriff Hannah did not have "just cause" for the imposition of an indefinite suspension of Messer without pay under West Virginia Code § 7-14-17. The Second is that the Commission erred in ruling that Messer should not have been suspended, without pay, as the alleged misconduct of overstating overtime was not of a substantial nature which directly affected the rights and interest of the public.
9. Sheriff Hannah asserts that the Commission erred in ruling that Sheriff Hannah failed to shoulder his burden of demonstrating just cause for the suspension of Messer, thereby reinstating Messer, as well as holding that Messer's misconduct was insignificant. Sheriff Hannah argues that it is of no consequence how much overtime was wrongfully claimed by Messer because a law enforcement officer's position is sensitive and there is a strict need for both propriety and the appearance of propriety.
10. West Virginia Code § 7-14-17 sets forth the procedure in which a deputy sheriff may be removed, discharged or suspended from a county sheriff's department as well as the process by which a deputy sheriff may be subject to a reduction in rank or pay. Pursuant to subsection (a) of this provisions, "[n]o deputy sheriff of any county subject to the provisions of this article may be removed, discharged, suspended or reduced in rank or pay except for just case, which may not be religious or political. Section 7-14-17 also states that the burden is on the sheriff to justify his or her action against a deputy sheriff. In the current case Sheriff Hannah argues that the Commission erred in ruling that Sheriff Hannah did not meet his burden of proving "just cause" for the indefinite suspension of Messer in order to further investigate the filing of allegedly untruthful payroll changes for overtime travel after it was

confirmed that Messer rented a motel room on the dates Messer claimed to have traveled to and from the Academy.

11. In Mangum v. Lambert, 183 W.Va. 184, 394 S.E.2d 879 (1990), the West Virginia Supreme Court of Appeals held that just cause refers to misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without a wrongful intention. The Magnum Court held that the test "is not whether the conduct breaks a specific law, but rather whether it is potentially damaging to the rights and interests of the public."

12. Sheriff Hannah argues that not only does the evidence demonstrate by preponderance that Messer submitted overtime charges that he did not incur, but the evidence also justifies the form of disciplinary action imposed by Sheriff Hannah. Sheriff Hannah asserts that the Commission had compelling evidence before it with respect to the conduct of a law enforcement officer that clearly preponderates that Messer submitted claims for overtime that was not incurred. Sheriff Hannah asserts the following in support of his argument:

- a. Messer claimed travel overtime for the dates of April 10 through April 13, 2006 while at the same time renting a motel room and the Motel 6 in Cross Lanes, West Virginia;
- b. In the investigative report prepared by Sgt. LaFauci, Messer acknowledged that he had rented the motel room at Motel 6 while at the specialized training. Messer further stated that he had stayed at the motel "some" and that he had driven home a "few times";
- c. Justice testified that he drove back and forth on the first two days of the specialized training and claimed travel overtime for those two days. On April 12, 2006, however, Justice testified that both he and Messer stopped at a convenience store and purchased a 12-pack of beer and then went to the Motel 6 where Messer was staying. Deputy Justice stayed with Messer that evening and testified that Messer was present when Justice went to bed sometime after 11:00p.m. and Messer was present when Justice awoke in the morning;
- d. Justice's disinterested testimony contradicts Messer's payroll change notices for April 12, 2006 and April 13, 2006. In the payroll change notice for April 12, Messer claimed travel time from 9:00p.m. to 11:00p.m. Yet, Justice's testimony was clear in that the low light shooting training did not end until 10:00p.m. and that he and Messer then went to the convenience store and to the Motel 6 after the training. Messer was

still present in the Motel 6 room when Justice went to sleep at some time after 11:00p.m. Messer's April 13, 2006 payroll change notice states that he drove from Mingo County to Institute from 6:00a.m. to 8:00a.m.; and,

- e. Messer's invocation of his Fifth Amendment right against self-incrimination. Unlike a criminal case, the Commission is permitted to draw an adverse inference from Messer's failure to testify since this is an administrative or civil proceeding. See State ex rel. Myers v. Sanders, 206 W.Va. 544, 526 S.E.2d 320 (1990); West Virginia Dept. of Health and Human Resources ex rel. Wright v. Doris S., 197 W.Va. 489, 475 S.E.2d 865 (1996). Messer offered no evidence, other than the statement contained in Sgt. LaFauci's investigative report, as to what his actions were during the April 10 through April 13, 2006 time period. In fact, not one witness has verified that Messer drove back and forth and stayed at the motel. Thus, there is an absence of evidence in the record to rebut the reasonable inferences drawn from the evidence presented by Sheriff Hannah.

13. Sheriff Hannah also cites numerous cases that states when there is sufficient "just cause" to dismiss a law enforcement officer. However, none of the cases cited by Sheriff Hannah are remotely factually similar to the instant case.

14. Sheriff Hannah contends that just cause was shown for Messer's suspension due to the fact that Prosecuting Attorney Sparks testimony to the Commission that he would not prosecute any case in which Messer was the primary investigating officer and that he believed he would be duty bound to turn over information concerning Messer's conduct to defense attorneys in criminal cases pursuant to the obligation the State of West Virginia has to provide exculpatory material to criminal defendants.

15. In Syllabus Point 2 of In re Queen, 196 W.Va. 442, 446, 473 S.E.2d 483, 487 (1996), the West Virginia Supreme Court of Appeals held that "[a]n appellate court may reverse a decision of the Correctional Officers' Civil Service Commission as clearly wrong or arbitrary or capricious only if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that was so implausible that it could not be ascribed to a difference in view or the product of Commission expertise." In Syllabus Point

3 of Queen the Court held that "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis."

16. After reviewing the entire record of the case, including a transcript of the July 18, 2006 hearing before the Commission, the Court **FINDS** that the Commission decisions were supported by substantial evidence and a rational basis. The Commission found that "Sheriff Hannah did not have 'just cause' for the imposition of the indefinite suspension of Messer without pay, under West Virginia Code, § 7-14-17, and that Messer should not have been suspended without pay, as the alleged misconduct of overstated overtime was not of a substantial nature which directly affected the rights and interest of the public. Rather, it is the conclusion of this Commission that Messer's conduct, in claiming the additional three to four hours of overtime was trivial and inconsequential and a mere technical violation of statute of official duty without wrongful intention, as Messer indicated to the investigating State Police Officer that he felt that charging for overtime driving to and from his training would cost the Sheriff's Office less than the cost of his motel room. Again, this Commission feels that the Sheriff should have attempted to handle this discrepancy in overtime charges in an administrative manner rather than through a State Police investigation of Messer." (See paragraph 11 of the Final Order Relevant to Indefinite Suspension of Sergeant Roy Glen Messer.) The Commission appears to have based its findings on the fact that although Messer did rent a hotel room there was no proof that he did not drive back and forth from Institute to Mingo County on a daily basis. In fact, the Commission found that the only amount of overtime submitted by Messer that was in question was four hours.

17. Furthermore, the Commission found that although Messer may have technically violated West Virginia Statute 7-14-17 Messer should not have been suspended without pay, as the alleged misconduct of overstated overtime was not of a substantial nature which directly affected the rights and interest of the public. Rather, the Commission found that Messer's conduct, in claiming the additional three to four hours of overtime was trivial and inconsequential and a mere technical violation of statute of official duty without wrongful intention, as Messer indicated to the investigating State Police Officer that he felt that charging for overtime driving to and from his training would cost the Sheriff's Office less than the cost of his motel room.
18. Sheriff Hannah asserts that if the Court affirms the Commissions ruling, Messer will go unpunished for the alleged wrongfully submitted three to four hours of overtime (if in fact it was greater than the non-billed hotel charges). However, the Court **FINDS** that while Messer was reinstated and awarded back pay by the Commission, Messer was suspended several months from his duties before the Commission entered its Order, lost overtime opportunities and suffered obvious significant embarrassment, along with the threat of criminal prosecution, all of which has certainly resulted in de facto punishment; if, in fact, any administrative punishment was warranted.
19. Under the above-cited law the Court is not permitted to overturn the decision of the Commission merely because the Court may have decided the matter in a different way. The Court is only permitted to overturn the decision of the Commission when the findings are not supported by the evidence, contrary to the evidence, or based upon a mistake of law. In the instant case the Court **FINDS** the Commission findings were supported by the evidence, were not contrary to the evidence, and were not based upon a mistake of law. The

Commission received, considered, and weighed evidence from both parties and correctly applied the law and therefore the Court cannot find any reversible error committed by the Commission.

20. Accordingly, based upon the findings of fact and conclusions of law contained herein, the Court hereby **DENIES** the Sheriff Hannah's Appeal and **AFFIRMS** the Final Order of the Mingo County Civil Service Commission.

ORDER

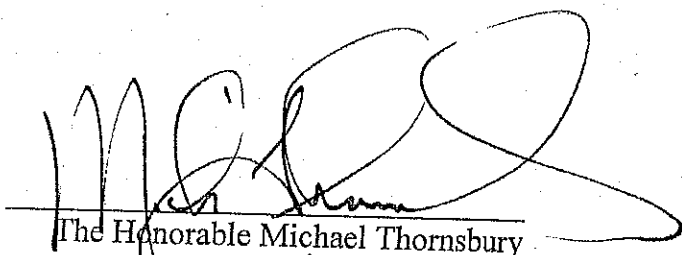
WHEREFORE, based upon the foregoing, the Court does hereby **ORDER, ADJUDGE, and DECREE** that Appellant, Sheriff Lonnie Hannah's, Appeal From the Mingo County Civil Service Commission is **DENIED** and the Final Order of the Mingo County Civil Service Commission is **AFFIRMED**.

This being a **FINAL ORDER** the Clerk is hereby **ORDERED** to strike this case from the active docket of this Court, and shall mail an attested copy of this Order to the parties herein.

Jeffrey Wakefield, Esquire (Counsel for Sheriff Lonnie Hannah)
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P.O. Box 3843
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Christopher Younger, Esquire (Counsel for Glen Messer)
106 Logan Street
Williamson, West Virginia 25661

ENTERED this the 30th day of January 2007.


The Honorable Michael Thornsburg
Chief Judge, 30th Judicial Circuit

A COPY TESTE


CIRCUIT CLERK, MINGO COUNTY, W.VA.